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UNITED STATES OF AMERICA)
) DEFENSE MOTION TO
) DISMISS FOR DENIAL OF THE
v.) RIGHT TO A SPEEDY TRIAL
)
) 4 October 2004
DAVID M. HICKS)
)

The defense in the case of the *United States v. David M. Hicks* moves for dismissal of all charges on the ground that Mr. Hicks has been irremediably denied his right to a speedy trial, and states in support of this motion:

- 1. **Synopsis**: Mr. Hicks has been denied the right to a speedy trial--a right protected under military law, civilian law under all domestic jurisdictions, and under international law. The only appropriate and sufficient remedy for such a violation is dismissal of all charges against Mr. Hicks.
- 2. Facts: Mr. Hicks was detained in Afghanistan in or around November 2001. The armed conflict in Afghanistan concluded in December 2001. On 3 July 2003, Mr. Hicks was designated as eligible for trial by military commission. Mr. Hicks was transferred to pre-commission confinement on 9 July 2003. Military counsel arrived at the Pentagon to be assigned to represent Mr. Hicks during the week of 14 July 2003. At that point, the Office of the General Counsel for the Department of Defense prevented the detailing of defense counsel. The Office of General Counsel then began negotiations with the Australian Government with regard to the military commission system that was slated to try Mr. Hicks. Agreements between the U.S. and Australian governments (without participation of or notice to Mr. Hicks or any representatives of his) were announced on 25 November 2003. Mr. Hicks was finally assigned military counsel on 28 November 2003. Charges were instituted against Mr. Hicks on 10 June 2004, and he first appeared before the military commission 25 August 2004.

3. Discussion:

A: The Right to a Speedy Trial

In many material respects, the government has been demonstrably dilatory in its implementation of the President's Military Order of 13 November 2001. The glacial establishment of the military commission and the prolonged pretrial detention of detainees at Guantanamo Bay Naval Base have been roundly and nearly unanimously criticized by the international community. Prominent U.S. senators have also publicly criticized the delay in the establishment of the commission process. In a letter to the Secretary of Defense in December

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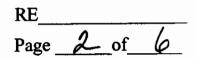
¹ One year after detainees had been transferred to Guantanamo Bay Naval Base, the basic procedures of the military commission still had not been established. For example, the Instruction identifying the crimes triable by military commission, and their elements, were not promulgated until 30 April 2003. See Military Commission Instruction

2003, Senator McCain, joined by Senators Graham and Cantwell, expressed their concerns regarding the process' failure to move forward.² Senator McCain was quoted saying: "The bureaucratic process has been unnecessarily slow . . . These cases have to be disposed of one way or another. After keeping someone for two years, a decision should be made." The Government was clearly on notice from multiple sources that implementation of the commission process was not adequately "speedy."

The detention of individuals like Mr. Hicks at Guantanamo Bay Naval Base throughout the commission's extended gestation process has contravened Article 10 of the Uniform Code of Military Justice (UCMJ). The UCMJ speedy trial requirement reflects an important human and civil right that is recognized as an essential element of a fair trial in civilian and military jurisdictions throughout the world, and is also recognized in important instruments in international law. Article 10 provides that any arrest or confinement of an accused must be terminated unless charges are instituted promptly and made known to the accused, and speedy trial afforded for a factual determination of such charges:

When any person subject to this chapter is placed in arrest or confinement prior to trial, immediate steps shall be taken to inform him of the specific wrong of which he is accused and try him or dismiss the charges and release him.

The UCMJ speedy trial requirement is more stringent than that expressed in the Sixth Amendment of the United States Constitution. For example, in *United States v. Calloway*, the court found that Article 10 had been violated in part because the accused had spent twenty days in pretrial confinement before the government took any action on his case. The Court in *United States v. Hatfield*, affirmed the Military Judge's ruling that the passage of 106 days before trial, 48 days of which were deemed inordinate delay, constituted a violation of Article 10. In



No. 2. The first of the Military Instructions was published on 30 April 2003, and eight others were published over the following eight months.

² Available at http://mccain.senate.gov/index.cfm?fuseaction=Newscenter.ViewPressRelease&Content_id=1200.

³ See San Juan, "Guantanamo Trials Coming Too Slowly, Says McCain after Visit," USA Today, 1 December 2003. Available at http://www.usatoday.com/news/washington/2003-12-11-mccain-guantanamo_x.htm.

⁴ See, e.g., the Sixth Amendment of the United States Constitution. For international protections of the right to a speedy trial, see Articles 9 and 14 of the International Covenant on Civil and Political Rights, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976). Available at http://www.unhchr.ch/html/menu3/b/a_ccpr.htm. Ratified by the US on 8 June 1992. And see Article 75 of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, opened for signature 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978). Available at http://www.icrc.org/Web/Eng/siteeng0.nsf/html/genevaconventions. These international human rights to a speedy trial are discussed in Defense Motion for Appropriate Relief: Imposition of Improper Pre-Trial Detention under International Law.

⁵ 47 M.J. 782, 784 (N.M.C.C.A. 1998).

^{6 44} M.J. 22 (C.A.A.F. 1996).

addition, the Navy and Marine Corps require that the assignment of defense counsel to persons confined be accomplished within ten days.⁷

B: Delays Assigning Military Counsel to Mr. Hicks

Mr. Hicks was designated 3 July 2003, as eligible for prosecution by military commission. He was transferred to pre-commission solitary confinement six days later, 9 July 2003. Yet even at that stage, the government had not completed the formulation of the commission system. In addition, despite Mr. Hicks' request for an attorney and the availability of military defense counsel to be detailed, the government inexplicably and inexcusably ignored those requests, and detailed counsel's readiness, and failed to provide counsel until 28 November 2003, when military defense counsel was assigned.

Continuing the snail's pace of developing the commission system, Mr. John D. Altenburg was not officially designated as Appointing Authority until 17 March 2004. Nor was Mr. Hicks charged until 10 June 2004, almost a year after he was designated as eligible for trial by military commission. Those charges were referred to this military commission on 25 June 2004.

The five-month delay in detailing military defense counsel hardly meets Article 10's requirement that "immediate steps" be taken towards trial. In addition, the delay can be attributed only to the desire of the government to gain a "tactical advantage" over Mr. Hicks by denying him access to counsel, enabling the government to gain further illegitimate fruits of continued uncounseled interrogation, as well as the ability to begin preparing a defense.

1. Negotiations between the United States and Australia—During the week of 14 July 2003, detailed military defense counsel was flown from Hawaii to the Pentagon to be assigned to represent Mr. Hicks. On the day of planned detailing, the Office of the General Counsel for the Department of Defense interceded to stop the detailing of counsel to Mr. Hicks. Concurrently, the Office of the General Counsel was preparing to meet with an Australian delegation "to discuss and review potential options for the disposition of Australian detainee cases." Lack of counsel prevented Mr. Hicks from participating at all in these discussions. While negotiations took place between the Australian and United States Governments in relation to Mr. Hicks, Mr. Hicks sat in solitary confinement, incommunicado, without counsel. A substantial opportunity was lost to influence the Australian Government in its agreements over the commission process and the fate of Mr. Hicks. These discussions concluded on 25 November 2003, and three days later counsel was detailed to Mr. Hicks.

⁷ See Commander, Naval Legal Service Command Instruction, 5800(1)(E).

⁸ The designation was brought about by Military Commission Order No. 5. It revoked Military Commission Order No. 2, which had designated the Deputy Secretary of Defense, Dr. Paul D. Wolfowitz, as Appointing Authority on 21 June 2003, then designated Mr. Altenburg.

⁹ DOD News Release, "DOD Statement on Australian Detainee Meetings." Available at http://www.defenselink.mil/releases/2003/nr20030723-0220.html.

¹⁰ See DOD News Release, "U.S. and Australia Announce Agreements on Guantanamo Detainees." Available at http://www.defenselink.mil/releases/2003/nr20031125-0702.html.

2. Interrogations without Presence of Counsel—During the course of these delays, Mr. Hicks was interrogated without the presence of counsel. Prior to his designation for prosecution, Mr. Hicks, after asking for counsel, was told that he did not have the right to counsel. While held incommunicado between June and December 2003, Mr. Hicks was unable to contact counsel nor represent himself. Both his Australian civilian counsel, Mr. Stephen Kenny, and his U.S. civilian lawyers (who represented Mr. Hicks in a federal habeas corpus action beginning in February 2002) were refused access to him by the U.S. Government. Throughout this period (and even after he had been designated for prosecution), interrogations continued; interrogations that would not have occurred had military counsel been assigned, or civilian counsel allowed access.

C: Delays Assigning Counsel Amount to Denial of Right to a Speedy Trial

The case of *Baker v Wingo*¹³ identified three ways in which the denial of the right to a speedy trial could prejudice a defendant:

- through oppressive pretrial incarceration;
- ii. through causing anxiety and concern to the accused; and
- iii. through allowing the possibility that the defense will be impaired.

The delays in providing Mr. Hicks with either detailed military counsel, or access to civilian counsel, has prejudiced Mr. Hicks in all three of the above ways. Mr. Hicks has been subjected to pretrial solitary detention for over two and a half years. Prolonged incommunicado and solitary detention, and the uncertainty as to his fate, has caused Mr. Hicks extreme anxiety and concern. The denial of access to counsel has also had a serious impact on Mr. Hicks' ability to prepare his defense while evidence was still attainable.

Over the period of delays, memories faded and potential witnesses dispersed across the world. In addition, once military counsel was assigned and granted access to Mr. Hicks, the government still did not grant access to other detainees at Guantanamo for defense interviews.¹⁴ This type of prejudice has been described by courts as "the most serious":

If witnesses die or disappear during a delay, the prejudice is obvious. There is also prejudice if defense witnesses are unable to recall accurately events of the distant past. Loss of memory, however, is not always reflected in the record because what has been forgotten can rarely be shown.¹⁵

¹¹ See Defense Motion for Access to Counsel in *Rasul et al v. Bush et al*, in the United States District Court, District of Columbia (4 March 2002).

¹² Id. See also Letter from Stephen Kenny, addressed to President George W. Bush (8 February 2002).

¹³ 407 U.S. 514, 532 (1972).

Additionally, the government has released well over one hundred detainees from Guantanamo, without defense being granted access to them prior to their release. See DOD News Release, "Transfer of French Detainees Complete." Available at http://www.defenselink.mil/releases/2004/nr20040727-1062.html.

¹⁵ Baker v Wingo, 407 U.S. 514, 532 (1972).

There has been a clear violation of the right to a speedy trial in the case of Mr. Hicks. Delays with respect to each step in the prosecution process, and more specifically the assignment of counsel, have been unacceptably lengthy. The combination of such delays with solitary and incommunicado detention, and interrogations, has allowed such delays to have a considerable impact on the ability of Mr. Hicks to prepare a defense. The military appellate courts have found that the only remedy for a violation of Article 10 is dismissal of charges with prejudice. Such a remedy is particularly appropriate in the case of Mr. Hicks. The defense therefore urges this commission to refuse to condone the denial of a speedy trial to Mr. Hicks caused by interference by the government in the assignment of counsel, and dismiss all charges against him.

4. Evidence:

A: The defense reserves the right to call witnesses after examining the Government reply to this motion.

B: Attachments

- "Senators Urge Decision on Disposition of Guantanamo Detainees,"
 December 2003.
- 2. "Guantanamo Trials Coming Too Slowly, Says McCain after Visit," USA Today, 1 December 2003.
- 3. International Covenant on Civil and Political Rights, Articles 9 and
- 4. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, Article 75.
- 5. Commander, Naval Legal Service Command Instruction, 5800(1)(E).
- 6. DOD News Release, "DOD Statement on Australian Detainee Meetings."
- 7. DOD News Release, "U.S. and Australia Announce Agreements on Guantanamo Detainees."
- 8. Defense Motion for Access to Counsel in *Rasul et al v. Bush et al*, in the United States District Court, District of Columbia (4 March 2002).
- 9. Letter from Stephen Kenny, addressed to President George W. Bush (8 February 2002).
- 10. DOD News Release, "Transfer of French Detainees Complete."
- 5. Relief Requested: The defense requests that all charges be dismissed.

¹⁶ United States v. Kossman, 38 M.J. 258, 262 (C.M.A. 1993).		

6. The defense requests oral argument on this motion.

By:

M.D. MORI

Major, U.S. Marine Corps

Detailed Defense Counsel

JEFFERY D. LIPPERT Major, U.S. Army Detailed Defense Counsel

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Civilian Defense Counsel for David M. Hicks



Offcol/the High Commissioner for Human Rights



International Covenant on Civil and Political Rights

Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966

entry into force 23 March 1976, in accordance with Article 49

Attachment _____to RE____

Article 9 General comment on its implementation

- 1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
- 2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.
- 3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.
- 4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.
- 5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

Attachment _____to RE ____

Article 14 General comment on its implementation

- 1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the quardianship of children.
- 2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.
- 3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
 - (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
 - (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
 - (c) To be tried without undue delay;
 - (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
 - (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
 - (f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;
 - (g) Not to be compelled to testify against himself or to confess guilt.
- 4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.
- 5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.
- 6. When a person has by a final decision been convicted of a criminal offence and

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when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

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Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.

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Art 75. Fundamental guarantees

- 1. In so far as they are affected by a situation referred to in Article 1 of this Protocol, persons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the Conventions or under this Protocol shall be treated humanely in all circumstances and shall enjoy, as a minimum, the protection provided by this Article without any adverse distinction based upon race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria. Each Party shall respect the person, honour, convictions and religious practices of all such persons.
- 2. The following acts are and shall remain prohibited at any time and in any place whatsoever, whether committed by civilian or by military agents:
- (a) violence to the life, health, or physical or mental well-being of persons, in particular:
- (i) murder;
- (ii) torture of all kinds, whether physical or mental;
- (iii) corporal punishment; and
- (iv) mutilation;
- (b) outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault;
- (c) the taking of hostages;
- (d) collective punishments; and
- (e) threats to commit any of the foregoing acts.
- 3. Any person arrested, detained or interned for actions related to the armed conflict shall be informed promptly, in a language he understands, of the reasons why these measures have been taken. Except in cases of arrest or detention for penal offences, such persons shall be released with the minimum delay possible and in any event as soon as the circumstances justifying the arrest, detention or internment have ceased to exist.
- 4. No sentence may be passed and no penalty may be executed on a person found guilty of a penal offence related to the armed conflict except pursuant to a conviction pronounced by an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure, which include the following:
- (a) the procedure shall provide for an accused to be informed without delay of the particulars of the offence alleged against him and shall afford the accused before and during his trial all necessary rights and means of defence;
- (b) no one shall be convicted of an offence except on the basis of individual penal responsibility:
- (c) no one shall be accused or convicted of a criminal offence on account or any act or omission which did not constitute a criminal offence under the national or international law to which he was subject at the time when it was committed; nor shall a heavier penalty be imposed than that which was applicable at the time when the criminal offence was committed; if, after the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby;
- (d) anyone charged with an offence is presumed innocent until proved guilty according to law;
- (e) anyone charged with an offence shall have the right to be tried in his presence;
- (f) no one shall be compelled to testify against himself or to confess guilt;
- (g) anyone charged with an offence shall have the right to examine, or have examined,

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the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

- (h) no one shall be prosecuted or punished by the same Party for an offence in respect of which a final judgement acquitting or convicting that person has been previously pronounced under the same law and judicial procedure;
- (i) anyone prosecuted for an offence shall have the right to have the judgement pronounced publicly; and
- (j) a convicted person shall be advised on conviction or his judicial and other remedies and of the time-limits within which they may be exercised.
- 5. Women whose liberty has been restricted for reasons related to the armed conflict shall be held in quarters separated from men's quarters. They shall be under the immediate supervision of women. Nevertheless, in cases where families are detained or interned, they shall, whenever possible, be held in the same place and accommodated as family units.
- 6. Persons who are arrested, detained or interned for reasons related to the armed conflict shall enjoy the protection provided by this Article until their final release, repatriation or re-establishment, even after the end of the armed conflict.
- 7. In order to avoid any doubt concerning the prosecution and trial of persons accused of war crimes or crimes against humanity, the following principles shall apply:

 (a) persons who are accused or such crimes should be submitted for the purpose of prosecution and trial in accordance with the applicable rules of international law; and (b) any such persons who do not benefit from more favourable treatment under the Conventions or this Protocol shall be accorded the treatment provided by this Article, whether or not the crimes of which they are accused constitute grave breaches of the Conventions or of this Protocol.
- 8. No provision of this Article may be construed as limiting or infringing any other more favourable provision granting greater protection, under any applicable rules of international law, to persons covered by paragraph 1

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DEPARTMENT OF THE NAVY

NAVAL LEGAL SERVICE COMMAND
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IN REPLY PROPERTY

COMNAVLEGSVCCOMINST 5800.1E JAG 63 19 Feb 02

COMNAVLEGSVCCOM INSTRUCTION 5800.1E

From: Commander, Naval Legal Service Command

Subj: NAVAL LEGAL SERVICE COMMAND (NLSC) MANUAL

- 1. <u>Purpose</u>. To issue policy for the operation of Naval Legal Service Offices, Trial Service Offices, the Naval Justice School, and their respective detachments, branch offices, and satellite offices.
- 2. Cancellation. COMNAVLEGSVCCOMINST 5800.1D.
- 3. <u>Background</u>. This publication provides guidance and Naval Legal Service Command (NLSC) policy for the operation and administration of Naval Legal Service Offices (NLSOs), Trial Service Offices (TSOs), the Naval Justice School (NJS), and their respective detachments, branch offices, and satellite offices. This instruction confers no individual rights for which there is an enforceable remedy.
- 4. <u>Discussion</u>. There have been a number of significant changes in Navy and NLSC policy since COMNAVLEGSVCCOMINST 5800.1D was issued. These include changes in reporting requirements, training, the Naval Reserve Law Program, courts-martial costs, legal assistance, and security matters. Additionally, this instruction now applies to the NJS except for those sections specifically dealing with departments and missions of NLSOs and TSOs. It should be considered a complete revision of the Naval Legal service Office and Trial Service Office Manual and read in its entirety.
- 5. Action. Commanding officers and officers-in-charge shall comply with this instruction as operational demands, organizational needs, and local conditions permit. As needed to address local circumstances, commanding officers and officers-in-charge may promulgate internal local command policies, operating procedures, regulations, and organizational structures consistent with this instruction by formal written instructions.

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g. See also paragraphs 1101 - 1103, and 1401 for additional policy regarding assignment of counsel.

1002 TRIAL DATE

Military judges are primarily responsible for docketing and trying courts-martial. TSOs are primarily responsible for expeditious case processing, but all parties have a responsibility to ensure the accused is afforded a speedy trial. TSOs shall coordinate with the convening authority for the timely attendance of the accused, members, bailiff, and witnesses.

1003 PREPARING AND FORWARDING GENERAL AND SPECIAL COURTS-MARTIAL RECORDS OF TRIAL

TSOs are responsible for preparing records of trial. See paragraph 1403. Defense counsels are authorized to examine records before authentication by the military judge, unless such examination will cause unnecessary delay. Records of trial shall be authenticated and forwarded to the convening authority promptly. Trial and defense counsel shall accord high priority to examining records of trial.

1004 RESPONSIBILITIES FOR THE CUSTODY OF DETAINEES AND PRISONERS

Under SECNAVINST 1640.9[series] (Subj: Department of the Navy Corrections Manual), brig personnel are generally accountable for prisoners and detainees during appointments outside the brig. However, there will be occasions during visits to NLSOs/TSOs when prisoners or detainees will be out of the sight and physical custody of brig personnel, such as when they are being counseled in private by defense counsel. On these occasions, NLSO/TSO personnel must ensure brig personnel are at all times in a position to exert positive control over detainees and prisoners. NLSO/TSO COs will prescribe procedures assigning responsibility and accountability for liaison with brigs, shore patrol, and other activities, concerning the transport, custody, and delivery of prisoners and detainees.

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Pursuant to Senate policy this homepage may not be updated for the 60 day period immediately before the date of a primary or general election.

News Center

Press Releases

SENATORS URGE DECISION ON DISPOSITION OF GUANTANAMO DETAINEES

For Immediate Release Friday, Dec 12, 2003

Washington, D.C. - U.S. Senators John McCain (R-AZ), Lindsey Graham (R-SC), and Maria Cantwell (D-WA), today se following letter to Secretary of Defense Donald Rumsfeld asking the Secretary to provide specific information about disposition of detainees being held at U.S. Naval Base Guantanamo Bay.

The Honorable Donald H. Rumsfeld Secretary Department of Defense 1000 Defense Pentagon Washington, D.C. 20301-1000

Dear Mr. Secretary:

As you know, we recently visited Guantanamo Bay, Cuba, to get a first-hand look at the situation regarding the confinem detainees from the conflict in Afghanistan.

We commend you on the outstanding efforts taken thus far to treat all individuals detained at Guantanamo humanely ar appropriate and in accordance with military necessity, in a manner consistent with the principles of the Third World Go Convention of 1949. We are particularly impressed by the professionalism of our military personnel.

The treatment of the detainees is not an issue. However, a serious concern arises over the disposition of the detainee considerable number of whom have been held for two years. Given this concern, we respectfully ask that you provide e information on two critical issues. First, we ask that you advise us as to when you will make a determination on the disposition of the detainees' status. Second, we request that you state specifically when you will begin the process pursu the Order of the Military Commissions that the President signed in November 2001, and how it will work in practice.

Mr. Secretary, our recent visit to see the detainee situation for ourselves provided an enormously useful opportur understand the essential work that has been done there, which we have supported. Yet, we firmly believe it is now time to a decision on how the United States will move forward regarding the detainees, and to take that important next step. A so process must be established in the very near term either to formally treat and process the detainees as war criminals return them to their countries for appropriate judicial action.

We look forward to your reply, and thank you in advance for your prompt attention to this important issue. Sincerely,

John McCain Lindsey Graham Maria Cantwell U.S. Senator U.S. Senator U.S. Senator JM/cjp ~ end ~ [back to press releases]

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Guantanamo trials coming too slowly, says McCain after visit

SAN JUAN, Puerto Rico (AP) — Sen. John McCain said Thursday he is concerned about the failure to move ahead with prisoners' trials at Guantanamo Bay, Cuba, where after nearly two years the military has allowed just one detainee to meet his lawyers.

Speaking by phone from Washington a day after touring Guantanamo, McCain said "bureaucratic inertia and fear of making a wrong decision" led to delays in the cases of some 660 people held on suspicion of links to Afghanistan's ousted Taliban government or the al-Qaeda terror network.

"I think the conditions are adequate, in some cases more than adequate. But my concern is the disposition of the prisoners," McCain told The Associated Press.

"The bureaucratic process has been unnecessarily slow," said McCain, who was a prisoner of war for nearly six years in Vietnam. "These cases have to be disposed of one way or another. After keeping someone two years, a decision should be made."

The Arizona Republican's comments came as an Australian prisoner, David Hicks, was expected to become the first detainee at the base to be allowed to meet with defense lawyers.

His Australian lawyer, Stephen Kenny, said this week that he planned a five-day visit starting Thursday, along with Hicks' military-appointed attorney, Marine Corps Maj. Michael Mori.

Hicks, 28, is one of six prisoners designated by President Bush as possible candidates for trial by military tribunals.

He was allegedly fighting with the Taliban when captured in Afghanistan, and also allegedly threatened to kill an American at Guantanamo. He still faces no formal charges.

Kenny said in Washington on Monday that he hopes to discuss with Hicks "what has happened, what his rights are, what may happen in the future, and to advise him of what his options are."

U.S. officials assured Australia that Hicks would not face the death penalty or have his conversations with lawyers monitored.

McCain said he will be "communicating with the Pentagon my concerns about the failure to move the process forward."

"I plan to urge that we have hearings," McCain said. He said some detainees are surely "killers" and that "there are others who should clearly be released."

McCain, a member of the Senate Armed Services Committee, visited along with Sen. Lindsey Graham, R-S.C., and Sen. Maria Cantwell, D-Wash.

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http://usatoday.printthis.clickability.com/pt/cpt?action=cpt&title=USATODAY.com+-+Gu... 10/1/2004

McCain noted the Bush administration is under pressure from other countries, such as Britain and Australia, to deal with the cases of the detainees from 44 nations.

Sweden, which has one citizen at Guantanamo, announced Wednesday it will seek to host an international seminar in the coming months on whether the United States is violating international law by keeping prisoners without charge.

U.S. officials classify the captives as unlawful combatants and say important intelligence is still being gleaned in interrogations.

Kenny says he believes a U.S. Supreme Court decision to hear a case involving Hicks and other British and Kuwaiti detainees may have prompted the U.S. government to allow Hicks to see lawyers. The court agreed last month to consider whether foreigners held at Guantanamo should have access to American courts.

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Find this article at:

http://www.usatoday.com/news/washington/2003-12-11-mccain-guantanamo_x.htm

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Updated 24 Jul 2003



United States Department of Defense

News Release

On the web: http://www.defenselink.mil/releases/2003/nr20030723-0220.html

Media contact: +1 (703) 697-5131

Public contact: http://www.dod.mil/faq/comment.html or +1 (703) 428-0711

No. 540-03 July 23, 2003

IMMEDIATE RELEASE

DOD STATEMENT ON AUSTRALIAN DETAINEE MEETINGS

The General Counsel of the Department of Defense, Hon. William J. Haynes II, met Monday through Wednesday with an Australian legal delegation, led by Minister of Justice Chris Ellison, to discuss and review potential options for the disposition of Australian detainee cases.

The discussions were productive and led to a number of assurances from the U.S. about the military commission process based on the principles of fairness contained in President Bush's Military Order of November 13, 2001, and Military Commission Order No. 1. Those principles include the presumption of innocence, proof of guilt beyond a reasonable doubt, representation by defense counsel, no adverse inference for choosing to remain silent, and the overall requirement that any commission proceedings be full and fair.

Among other things, the U.S. assured Australia that the prosecution had reviewed the evidence against David Hicks, and that based on the evidence, if that detainee is charged, the prosecution would not seek the death penalty. Additionally, the circumstances of his case are such that it would not warrant monitoring of conversations between him and his defense counsel.

This week's visits follow a July 18 decision by President Bush to discuss and review potential options for the disposition of Australian detainee cases and not to commence any military commission proceedings against Australian nationals pending the outcome of those meetings.

Individual enemy combatants held by the U.S. in the war on terrorism will continue to be assessed on a case-by-case basis based on their specific circumstances for an appropriate disposition of their case. To date, no enemy combatant has been charged for trial before a military commission. No military commission proceedings will begin against any Australian nationals until after further discussions planned for the near future.

Discussions with British legal representatives are ongoing and no military commission proceedings will begin against any British nationals until completion of those discussions.

http://www.defenselink.mil/releases/2003/nr20030723-0220.html

Attachment ______ to RE_____



United States Department of Defense

News Release

On the web: http://www.defenselink.mil/releases/2003/nr20031125-0702.html

Media contact: +1 (703) 697-5131

Public contact: http://www.dod.mil/faq/comment.html or +1 (703) 428-0711

IMMEDIATE RELEASE

No. 892-03 November 25, 2003

U.S. AND AUSTRALIA ANNOUNCE AGREEMENTS ON GUANTANAMO DETAINEES

WASHINGTON, D.C. -- The United States and Australian governments announced today that they agree the military commission process provides for a full and fair trial for any charged Australian detainees held at Guantanamo Bay Naval Station.

Following discussions between the two governments concerning the military commission process, and specifics of the Australian detainees' cases, the U.S. government provided significant assurances, clarifications and modifications that benefited the military commission process.

After examining the specific facts and circumstances surrounding each Australian detainee case, the Department of Defense was able to provide the following assurances, which are case specific:

The prosecution has reviewed the evidence against the Australian detainees, and based on that evidence, the prosecution would not seek the death penalty;

The security and intelligence circumstances of Mr Hick's case are such that it would not warrant monitoring of conversations between him and his counsel;

If David Hicks is charged, the prosecution does not intend to rely on evidence in its case-inchief requiring closed proceedings from which the accused could be excluded; and

The U.S. and Australian government will continue to work towards putting arrangements in place to transfer Hicks, if convicted, to Australia to serve any penal sentence in accordance with Australian and U.S. law.

Subject to any necessary security restrictions, military commissions will be open, the media present and appropriately cleared representatives of the accused's government may observe the proceedings;

If an accused is convicted, the accused's government may make submissions to the Review Panel;

If eligible for trial, and subject to security requirements and restrictions, an accused may be permitted to talk to appropriately cleared family members via telephone, and two appropriately cleared

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http://www.defenselink.mil/cgi-bin/dlprint.cgi?http://www.defenselink.mil/releases/2003/n... 9/30/2004

family members would be able to attend their trial; and,

An accused may choose to have an appropriately cleared foreign attorney as a consultant to the Defense Team. Foreign attorney consultant access to attorney-client information, case material or the accused will be subject to appropriate security clearances and restrictions and determined on a case-by-case basis.

The assurances are in addition to other military commission procedures which already provide for the presumption of innocence, proof of guilt beyond a reasonable doubt, representation by a competent and zealous defense counsel free of charge, no adverse inference for choosing to remain silent and the overall requirement that any commission proceedings be full and fair.

The Department of Defense is in the process of drafting clarifications and additional military commission rules that will incorporate the assurances where appropriate.

http://www.defenselink.mil/releases/2003/nr20031125-0702.html

Attachment _______to RE_____ Page __________ of ________

IN THE UNITED STATES DISTRICT COURTOPY FOR THE DISTRICT OF COLUMBIA

RASUL, et al.,

Petitioners.

v.

Civil Action: 02-299 (CKK)

BUSH, et al.

Respondents.

MOTION FOR ACCESS TO COUNSEL

COME NOW, PETITIONERS, by counsel, and respectfully move this Court pursuant to the Fifth, Sixth, and Eighth Amendments to the United States Constitution, and such other law as is set forth below, to allow immediate access to counsel pending resolution of the other matters involved in this case. In support of the motion, Petitioners state as follows:

- 1. Petitioners are being held in Camp X-Ray, on Guantanamo Bay, and have not had access to any family member or counsel. The only messages they have been allowed to send have been on forms provided by the Red Cross for "family and/or private news."
- Petitioners have sent messages specifically requesting that their family seek counsel for them. See Petition for Writ of Habeas Corpus at Paras. 6, 15.
- 3. Counsel must have access to their clients to respond to the Government's jurisdictional challenge. On a number of issues, the clients can provide reliable information responsive to the Government's unsworn allegations. For example, the manner in which the detained clients were taken into custody will be relevant to this Court's jurisdiction; manifestly, however, unless the dispute is to be resolved based on Respondents' information alone, the

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clients must be provided access to counsel. We develop these factual issues, and the Court's authority to order the requested relief, in the accompanying Memorandum in Support, incorporated herein by reference.

- 4. The right to counsel is fundamental both to the United States Constitution and to international law. There can be no reasonable objection, let alone a compelling one, to contact between counsel and the clients.
- 5. Pursuant to LCvR 7.1(m), counsel for the Petitioners discussed with AUSA Robert Okun, counsel for the Respondents, whether his clients would oppose providing Petitioners with the relief sought by this Motion. AUSA Okun stated that the Respondents would oppose this Motion.

CONCLUSION

WHEREFORE Petitioners respectfully move that they expeditiously be allowed contact with counsel.

Respectfully submitted,

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MAN FUR

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Washington, D.C. 20009
202.234.9000
Local Counsel for All Petitioners

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was sent via facsimile and hand delivery this 4th day of March 2002, to the following:

Roscoe C. Howard, Jr.
United States Attorney for the District of Columbia c/o AUSA Robert Okun
555 Fourth Street, N.W.
Room 11-858
Washington, D.C. 20001
202.514.8784

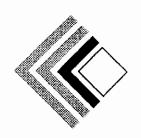
L. Barrett Boss

Our Ref: 120542/SK

Please reply to Adelaide office

8 February 2002

Mr George W Bush
The President
United States of America
The White House
1600 Pennsylvania Avenue NW
Washington, DC 20500
USA



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DX 339 Adelaide

Dear Sir

Detention of Australian Citizen David Matthew Hicks

We refer to our letter of 25 February 2002.

We confirm that we act for Terry Hicks and have been requested by our client to act for and on behalf of his son David Hicks. As you are aware David is currently being detained, apparently under your authority, at Guantanamo Bay in Cuba.

We note that in this morning's press, there were reports that members of the Taliban would be granted Prisoner of War status.

We enquire as follows:

- 1. Will David Hicks be afforded the Prisoner of War status and have the Geneva Convention rights applied to him?
- 2. If he is not so classified, could you please confirm the basis on which he is being detained, in accordance with our previous request?
- 3. Has David Hicks been advised of his legal rights?
- 4. Will you allow access by legal counsel to David Hicks?

To date, Mr Terry Hicks has only been able to receive one short note from his son via the Red Cross. He is most anxious to be able to speak to his son and we would be grateful if you would allow direct contact between David and his father. Mr Hicks would be willing to travel to Cuba to visit his son and we would be grateful if you could assist in making arrangements for such a visit.

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In the meantime, we enquire whether Mr Terry Hicks may speak to his son on the telephone.

Mr Hicks is extremely concerned about his son's mental welfare and particularly notes the press reports as to his son's agitation in Cuba. Mr Hicks is of the opinion that if he were able to speak to his son, he may be able to reassure his son of the support of his family and he believes that this will assist in easing David's anxiety and lessen the risk of any potential incident involving David.

We advise that Mr Terry Hicks has no involvement with al Quaeda or any associated organisation and does not in any way support those organisations.

As you will appreciate, this is a matter great concern to the Hicks family and a prompt response would be appreciated.

We thank you in anticipation.

Yours faithfully

CAMATTA LEMPENS PTY LTD

STEPHENKENNY

email: kenny@camattalempens.com.au

CC.

Mr Donald Rumsfeld, Secretary of Defence

Mr John Ashcroft, Attorney General of the United States

The Hon. Daryl Williams AM QC MP, Attorney General of Australia

Attachment 9 to RE ____



United States Department of Defense

News Release

On the web: http://www.defenselink.mil/releases/2004/nr20040727-1062.html

Media contact: +1 (703) 697-5131

Public contact: http://www.dod.mil/fag/comment.html or +1 (703) 428-0711

IMMEDIATE RELEASE

No. 714-04 July 27, 2004

TRANSFER OF FRENCH DETAINEES COMPLETE

The Department of Defense announced today that it transferred four detainees from Guantanamo Bay, Cuba to the control of the government of France. These detainees are French nationals.

The decision to transfer or release a detainee is based on many factors, including whether the detainee is of further intelligence value to the United States and whether he is believed to pose a threat to the United States if released.

There are ongoing processes to review the status of detainees. A determination about the continued detention or transfer of a detainee is based on the best information and evidence available at the time. The circumstances in which detainees are apprehended can be ambiguous, and many of them are highly skilled in concealing the truth. The process of evaluation and detention is not free of risk – at least five detainees have gone back to the fight.

During the course of the war on terrorism, the department expects that there will be other transfers or releases of detainees. This transfer was not part of the recently announced Combatant Status Review Tribunal; it was coordinated prior to that announcement.

Because of operational and security considerations, no further details can be provided.

Previously, 129 detainees were transferred for release and 18 others were transferred to the control of other governments (seven to Russia, four to Saudi Arabia, one to Spain, one to Sweden and five to Great Britain). 151 detainees have now departed Guantanamo. As a result of today's transfer, there are now approximately 590 detainees at Guantanamo Bay, Cuba.

http://www.defenselink.mil/releases/2004/nr20040727-1062.html

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